SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 1149

LOUIS H. MOONEYHAN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

LOWE WATKINS,
14th Floor,
American Trust Building,
Nashville, Tennessee 37201,
Counsel for Petitioner.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101 CEntral 1-4[illegible]77

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Petitioner Louis H. Mooneyhan prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on January 8, 1969, denying petitioner's petition for rehearing and adhering to its original opinion rendered December 5, 1968.

OPINIONS BELOW.

The decision of the Tax Court of the United States (Appendix, *infra*, p. A-1) was filed March 29, 1967, was entered on April 6, 1967 and is reported at 47 T. C. 693.

The opinion of the Court of Appeals (Appendix, *infra*, p. A-25) rendered December 5, 1968, is reported in 404 F. (2d) 522. A petition for rehearing was filed within the time allowed under Rule 40 of the Federal Rules of Appellate Procedure for the United States Court of Appeals effective July 1, 1968. The order of the Court entered January 8, 1969, denying the petition for rehearing (without opinion) is not yet reported (Appendix, *infra*, p. A-35).

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed, was pronounced on December 5, 1968, and was entered on the same date. The order of the Court of Appeals denying the rehearing was made and entered on January 8, 1969. The jurisdiction of this Court to review the judgment or decree in question by Writ of Certiorari is conferred by 28 U. S. C., Section (1958 ed.) 1254 (1). This Petition for Certiorari is filed within the time allowed by 28 U. S. C., Section (1958 ed.) 2101 (c).

QUESTION PRESENTED.

Whether within the meaning of Section 911 (a) (2) of the Internal Revenue Code of 1954 (26 U. S. C. 1958 ed.) petitioner's compensation (received in the years 1959, 1960, 1961 and 1962) herein involved, for work in Iran was paid by the United States, or an agency thereof, so as to be subject to United States income tax or whether it was paid by Iran and hence not subject to such taxes.

STATUTE INVOLVED.

The statutory provisions involved are those found in Section 911 of the Internal Revenue Code of 1954, 26 U. S. C. 1958 ed., Section 911 as follows:

"Subpart B—EARNED INCOME OF CITIZENS OF UNITED STATES.

Sec. 911. Earned income from Sources without the United States.

(a) General Rule.—The following items shall not be included in gross income and shall be exempt from taxation under this subtitle: . . .

(2) PRESENCE IN FOREIGN COUNTRY FOR 17 MONTHS.—In the case of an individual citizen of the United States who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) which constitute earned income attributable to services performed during such 18-month period. The amount excluded under this paragraph for any taxable year shall be computed by applying the special rules contained in subsection (c)."

REGULATIONS.

Treasury Regulations Section 1.911-1 (b) (1)—"Qualifications for exemption" provides:

"Subject to the limitations in subparagraph (2) of this paragraph, amounts constituting earned income as defined in section 911 (b) shall be excluded from gross income in the case of an individual citizen of the United States who during any period of 18 consecutive months is present in a foreign country or countries during a total of at least 510 full days, if such amounts are (i) from sources without the United States, (ii) attributable to such period and (iii) not paid by the United States or any agency or instrumentality thereof."

STATEMENT OF FACTS.

These proceedings began when petitioner filed in the Tax Court his petition for a redetermination of deficiencies determined by the Commissioner of Internal Revenue in petitioner's income tax for the calendar years 1959, 1960 1961, and 1962. In 1961 petitioner had been refunded the tax withheld from his 1960 compensation. The Tax Court had jurisdiction under Section 6213 (a) of the Internal Revenue Code of 1954, 26 U. S. C., Sec. 1958 ed. 6213 (a).

Petitioner, a United States citizen, was engaged in private employment except for non-Civil Service, temporary employment by the United States Bureau of Public Roads in highway construction in Ethiopia and Iran for several tours of service during the years 1952-1962 (R. 88a-89a, 102a-104a).* The Commissioner concedes that petitioner remained in Iran the time required for exemption from United States income tax (R. 80a) but contends that petitioner's compensation was paid by the United States and is therefore taxable (R. 80a). Petitioner contends that his compensation was paid by Iran and is therefore not taxable.

Petitioner received refunds for the years 1952, 1954, 1957, 1958, and 1960, of United States income tax withheld from his compensation as an employee of the United States Bureau of Public Roads for service in Ethiopia and Iran (R. 90a). In 1956 the United States District Court for the Eastern District of Tennessee held that similar compensation was not subject to United States income tax. **Krichbaum v. United States**, 138 F. Supp. 515. The Government did not appeal the decision.

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* "R" references are to Appendix B to the Commissioner's Brief in the Court of Appeals.

Petitioner was assigned by the Bureau to Iran pursuant to an agreement of December 18, 1956, between the Imperial Government of Iran and the Bureau, entitled "General V. Ansari, Credit Agreement" as amended by letter of August 2, 1960, a credit agreement of December 7, 1956, which provided for an Export-Import Bank loan to the Imperial Government of Iran (R. 104a) and credit agreement of the International Bank for Reconstruction and Development with Iran (R. 105a).

A "Dollar Working Fund" was by agreement established by Iran with the Bureau for payment of the expenses of the highway program, including compensation of Bureau personnel (which included petitioner), in a "Trust Fund Account 13X8502(2)" entitled "Technical Assistance United States Dollars Advanced From Foreign Governments, Bureau of Public Roads" (R. 108a-109a).

The agreement provided that the Government of Iran would not impose taxes on the compensation of Bureau personnel (R. 107a).

All salaries and allowances received by petitioner for his service in Iran were paid from this Trust Fund Account established by Iran, from its own funds, with the United States Treasury Department to pay such expenses (R. 81a).

No funds credited to the Trust Fund were appropriated by the Congress of the United States for such purposes (R. 81a-82a, 108a-109a).

The funds in this account **belonged** to Iran, to which the Bureau as Trustee was required to make a final itemized accounting and to which any balance remaining had to be delivered (R. 81a, 107a). The Trust Agreement between Iran and the United States allowed the United States, the trustee, a fee of one (1) per cent of the trust fund expended for the account of Iran (R. 56a).

The furnishing of petitioner's services to the Iranian Government was **contingent** upon the deposit of the necessary funds by Iran (R. 82a, 109a).

REASONS FOR GRANTING WRIT.

1. The Court of Appeals incorrectly interpreted the legislative history of Code Section 911 (a) (2) as manifesting Congressional intent to tax, and not to exempt, petitioner's compensation notwithstanding that this history occurred **before** Congress had its mind on the as then yet unheard-of foreign aid program in which the petitioner participated, and before Congress could have had any intent with reference to the kind of situation presented in this case.

2. The Court of Appeals failed to consider or pass on a point raised by petitioner. The Court of Appeals, without explanation, denied the petition for rehearing although its original opinion had not mentioned this point which had been made and argued in petitioner's Brief and oral argument. The vague, inconclusive and non-discriminating legislative history relied on by the Court of Appeals throws no light on the narrow issue involved here and is outweighed by the force of the provisions of Sections 931 (i) and 934 (b) of the Code, which are in *pari materia* with Section 911 (a) (2) and must be construed together with it. The two other Sections enacted **after** 911 (a) (2), show a consummate ability by Congress to deal with the narrow issue involved here when Congress intends to do it. They provide that earnings of an employee of the United States from sources without the United States "shall be deemed to be derived from sources within the United States", whereas Sec. 911 excludes from tax **all** earned income from sources without the United States "except amounts paid by the United States or an agency thereof".

3. The decision of the Court of Appeals thwarts what it purports to find was the Congressional purpose of Section 911, "to spur Americans to work abroad . . .", because the decision deprives them of the principal inducement to work abroad by exposing them to the income tax.

4. The Agreement with Iran, governing petitioner's status, provides that Iran will not impose an income tax on his compensation, thus recognizing that Iran **could** have taxed his compensation. As the Agreement is silent on the United States income tax, it would be ironic to suppose that Iran supplied the petitioner's compensation and refrained from taxing it while leaving the United States free to tax it. It was thought essential for Iran to **agree** not to tax. It was not supposed that the United States would tax compensation earned outside the United States and not supplied at any cost to the United States.

5. The United States was not the owner, but only the trustee, of the funds furnished by Iran to pay the petitioner's compensation. Indeed, not only was petitioner paid with these funds, the United States itself was paid therefrom its trustee's compensation of 1 per cent of the trust funds disbursed by it for the account of Iran, creator of the trust. Iran paid petitioner **and paid the United States.**

6. If this were private litigation the Respondent would be estopped to impose the tax. Petitioner had a right to rely on **Krichbaum v. United States,** 138 F. Supp. 515 (E. D. Tenn. 1956), from which the Government did not appeal, and the successive tax refunds made to him.

7. An important question is raised respecting the meaning of provisions of the Internal Revenue Code on which the lower Federal Courts, being without guidance from this Court, have been reaching contrary results in the

decided cases, so that a particular individual's status as taxpayer depends on which Court is trying his case.

8. The decision of the Sixth Circuit in this case conflicts with that of the Ninth Circuit in **Erlandson v. Commissioner**, 277 F. 2d 70 (1960). In **Erlandson**, the Ninth Circuit, construing this Statute, held that the salary of an employee of a private company paid from funds furnished the company for that purpose by the United States was "paid by the United States" and hence not exempt from tax. The rationale of that decision is that the words "paid by the United States" refer to the **source** of the funds used in paying whereas in the case *sub judice* the Sixth Circuit interpreted the words as referring to the entity (the United States) which as a trustee of Iranian funds, issued the salary checks to petitioner.

9. The decision of the Court of Appeals erroneously interprets and applies the Statute and regulations. Petitioner's compensation cost the United States nothing, hence it was not "paid by the United States, or an agency thereof" within the statutory sense and it is not subject to the tax.

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LOWE WATKINS,
Counsel for Petitioner.

March 4, 1969.

47 T. C. No. 69.

Tax Court of the United States.

Louis H. Mooneyhan, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Docket Nos. 2699-64. 2700-64.

Filed March 29, 1967.

Petitioner was in Iran from September 29, 1957 to September 29, 1959, and from June 19, 1960 to June 24, 1962, working as an employee of the Bureau of Public Roads of the Department of Commerce pursuant to an agreement between that Bureau and the Iranian Government that his compensation would be paid or reimbursed from a Dollar Working Fund deposited by Iran with the United States Treasury. *Held,* petitioner was not paid by the United States or an agency thereof while working in Iran and since he also otherwise meets the requirements of sec. 911 (a) (2), I. R. C. 1954, is entitled to exclude from his gross income for each of the years 1959, 1960, 1961, and 1962 the compensation he received for his work in Iran.

Lowe Watkins, for the petitioner.

Charles G. Barnett, for the respondent.

Scott, *Judge*: Respondent determined deficiencies in petitioner's income tax for the calendar years 1959, 1960, 1961, and 1962 in the amounts of $1,952.15, $863.26, $2,634.22, and $2,063.32, respectively.

The issues for decision are

(1) Whether petitioner is entitled to exclude from his gross income in each of the years here involved, under the provisions of section 911 (a) (2) of the Internal

Revenue Code of 1954,[1] the salaries he received while working in Iran as an employee of the Bureau of Public Roads, Department of Commerce, assigned to the Iran Division.

(2) If not otherwise entitled to such an exclusion, does the fact that respondent did not question an exclusion taken by petitioner purportedly under section 911 (a) (2) for years he was employed in Ethiopia entitle petitioner to such exclusion?

(3) Was respondent prohibited from issuing a valid notice of deficiency to petitioner for the year 1960 because of previously having refunded to petitioner all amounts of tax withheld from his wages for that year?

(4) If petitioner is not entitled to exclude the salaries he received while working in Iran, is he entitled to a deduction as an ordinary and necessary business expense for the cost of his meals while he was working in Iran during the year 1959?

(5) If petitioner is not entitled to exclude in full the salaries he received while he was working in Iran, is he entitled to exclude from his gross income under section 912 (1) the portion of the compensation he received which constitutes foreign differential allowances?

FINDINGS OF FACT.

Some of the facts have been stipulated and are found accordingly.

Petitioner is and at all times pertinent hereto was a citizen of the United States. He resided at the date of the filing of the petitions in these cases in Nashville, Tennessee. He filed his individual Federal income tax returns for the calendar years 1959, 1960, and 1961 with the dis-

[1] All references are to the Internal Revenue Code of 1954.

trict director of internal revenue, Nashville, Tennessee, and he filed his individual Federal income tax return for the calendar year 1962 with the Director of International Operations, Washington, D. C.

Prior to 1954, petitioner was engaged in construction work and road building for private contractors and as an employee of State Governments. From sometime in 1952 to sometime in 1954 and again from some later date in 1954 to sometime in 1956 petitioner was employed by the Bureau of Public Roads of the Department of Commerce (hereinafter referred to as the Bureau) in Ethiopia, Africa.

On September 22, 1957, the Bureau offered, and petitioner accepted, an Excepted Appointment—Indefinite under section 527 (c) (1) Mutual Security Act of 1954 (now section 625 (d) Foreign Assistance Act of 1961), and was assigned to the Iran Division as an equipment specialist, grade ICA-7. Petitioner arrived in Iran on September 29, 1957, and served in Iran pursuant to his appointment by the Bureau until September 29, 1959. On October 19, 1958, petitioner was promoted to equipment specialist, grade ICA-6. On September 29, 1959, petitioner left Iran and arrived in the continental United States on September 30, 1959. On November 3, 1959, he was separated from his employment by the Bureau in accordance with his voluntary resignation.

On June 13, 1960, the Bureau offered, and petitioner accepted, an excepted appointment under the same provisions of law as his prior appointment and was assigned to the Iran Division of the Bureau as an equipment specialist, grade ICA-6. Petitioner arrived in Iran on June 19, 1960, and served in that country until June 24, 1962, when he departed from Iran for the continental United States where he arrived on July 18, 1962. On August 17, 1962, pursuant to his voluntary resignation,

petitioner was separated from his employment by the Bureau.

Petitioner was not serving in a competitive Civil Service status when he accepted the excepted position in 1957 or when he reentered the excepted service in 1960 and did not have any statutory or regulatory rights to reemployment in the competitive Civil Service. Petitioner while employed by the Bureau in the Iran Division was entitled as a Government employee to the benefits of the Federal laws governing performance ratings, incentive awards, Federal Employees Pay Act, annual and sick leave, unemployment compensation, and Federal Employees Group Life Insurance. He was not entitled to the benefits of the Federal Employees Health Insurance Act or to the Federal Employees Retirement Act.

Petitioner's assignment by the Bureau to Iran was in accordance with the terms of an agreement dated December 18, 1956, between the Imperial Government of Iran (hereinafter sometimes referred to as the Iranian Government) and the Bureau entitled, "General V. Ansari, Credit Assignment." This agreement was in the form of a letter addressed to General Vali Ansari, Minister of Roads and Communications, Imperial Government of Iran, by the Commissioner of Public Roads of the Bureau and was amended by a similar letter addressed to General V. Ansari, on behalf of the Bureau, dated August 2, 1960, which letter confirmed that except as amended the original agreement remained in effect. Both the original and amended agreements were confirmed on behalf of the Iranian Government. The agreement as amended will hereinafter be referred to as the letter agreement. The letter agreement referred to a credit agreement.

The credit agreement of December 7, 1956, referred to in the original letter agreement, provided for a loan by the Export-Import Bank of Washington to the Imperial Government of Iran in the sum of $5,000,000 to assist Iran

in financing the acquisition in the United States and exportation to Iran of highway equipment and a program of highway maintenance and training in Iran, together with the services of United States highway engineers and technicians in connection therewith, with the understanding that Iran would make arrangements with the Bureau whereby the Bureau would provide the services of United States engineers and technicians to assist in developing and carrying out the program of highway maintenance and training. Further similar credit agreements were entered into between the Export-Import Bank of Washington and the Iranian Government and the International Bank for Reconstruction and Development and the Iranian Government.

From September 22, 1957 until November 3, 1959, and from June 3, 1960 to December 25, 1960, petitioner worked on construction projects financed from the proceeds of the credit agreements between the Export-Import Bank of Washington and the Iranian Government, and from December 25, 1960 until August 17, 1962, petitioner worked on road construction projects financed from the proceeds from credit agreements between the International Bank for Reconstruction and Development and the Iranian Government.

The letter agreement of December 18, 1956, provided that the objectives of the program were to achieve the maximum highway maintenance with the resources at the disposal of the Iranian Government while laying the foundations for a modern highway organization of well trained personnel, properly equipped to carry out a continuing program of highway construction and maintenance in Iran. The agreement provided that in furtherance of these objectives the Bureau "is prepared to put its experience at your disposal, to assign the requisite personnel," and specifically to assist in preparing the general plan of highway maintenance, in developing and carrying

out the program of highway maintenance, in selecting highway maintenance equipment, in procuring such items of equipment, and in recommending steps to reorganize the Highway Division of Iran. The letter agreement further provided that, "To perform the foregoing services, the Bureau will assign the following personnel," which included a Division Engineer and other engineers and technical specialists. The agreement provided that the Division Engineer would be in charge of all personnel of the Bureau assigned to Iran under the agreement and would provide direct liaison with the Minister of Roads of Iran. The letter agreement provided with respect to compensation of personnel assigned to Iran that the "compensation of all personnel of the Bureau assigned to Iran from the date of assignment to the date of separation from the program will be paid or reimbursed out of the Dollar Working Fund to be established by your Government as provided in Paragraph VII." Paragraph VII provided with respect to the Dollar Working Fund as follows:

> To carry out the conditions of the $5,000,000 loan from the Export-Import Bank signed on December 7, 1956 your Ministry will establish a Dollar Working Fund in the maximum amount of $500,000 with the Bureau to be at the disposal of the Bureau for the payments as set out in this Agreement.
>
> The Dollar Working Fund shall be established in the amount of $200,000 and shall be replenished by your Government from time to time upon the request of the Bureau accompanied by an itemized statement signed by an authorized representative of the Bureau setting forth all expenditures made therefrom which have not been reported in any previous itemized statement. With respect to each such expenditures, such statement shall specify the date, purpose and amount thereof and the name and address of the person or

other entity receiving the same and shall be accompanied by such supporting documents as your Government may reasonably request.

Each such replenishment of the Dollar Working Fund by your Government shall be in an amount equal to the total of the expenditures set out in the itemized statement accompanying the request for replenishment. In connection with any such replenishment of the Dollar Working Fund, your Government shall deposit therein such additional amount as the Bureau may recommend and your Ministry may approve to meet prospective expenditures from the Dollar Working Fund; provided, however, that the amount in the Dollar Working Fund at any one time shall not exceed $500,000.

Promptly following the last expenditure from the Dollar Working Fund, the Bureau will submit a final itemized statement signed as aforesaid setting out all expenditures made therefrom which have not been reported in any previous itemized statement and will return to your Government any balance in the Dollar Working Fund remaining after such last expenditure.

The letter agreement further provided that all expenses for office rental, Iranian stenographic and clerical help, transportation, and other out-of-pocket expenses incurred by personnel of the Bureau assigned to Iran should be paid or reimbursed by the Ministry of Roads of Iran. The agreement also carried a provision that the Government of Iran would grant exemption from all income taxes, duties, fees, and customs charges upon the compensation of personnel of the Bureau assigned to Iran and upon imports of household and personal effects, including automobiles, for the personal use of the employee or his dependents.

The 1960 amendment made some changes in the statement of the services to be rendered specifically stating in this respect as follows:

> To assist in preparing the general plan of highway maintenance to be accomplished during the period and to assist in supervising its execution within the limits of authority as granted in writing from time to time by the Ministry of Roads. The Bureau of Public Roads shall not be responsible for any operation for which the authority to operate is not specifically delegated by the Ministry.

The agreement also made some changes in the personnel to be assigned by the Bureau to Iran and specified more precisely the local expenses to be paid by the Ministry of Roads of Iran and how these expenses were to be paid. This amendment provided that except for office rental, local air travel, and certain specified other items, the expenses should be paid from funds set up by the Ministry to the account of the Division Engineer of the Bureau, the account to be referred to as Division Engineer's Operating Fund, that quarterly payments should be made by Iran into this account, and that the Division Engineer should account for expenditures from this fund by statements submitted monthly to the Iranian Ministry of Roads. No other provisions of the original letter agreement were changed.

Pursuant to the terms of paragraph VII of the letter agreement, a Dollar Working Fund was established by the Iranian Government from the dollar proceeds of the various credit agreements. The Dollar Working Fund was established by checks drawn by the Iranian Government and made payable to the Bureau which were deposited with the United States Treasury Department and credited to Trust Fund Account 13X8502 (02) entitled, "Technical Assistance United States Dollar Advanced From Foreign Governments, Bureau of Public Roads." Certain expenses incurred by the Bureau in fulfilling its obligations under the letter agreement, including all salaries and allowances paid to petitioner while assigned to the Bureau's Iran

Division, were either paid by direct charges against the Dollar Working Fund or were reimbursed therefrom. No funds credited to the Dollar Working Fund were appropriated by the Congress of the United States for salary expenses for Bureau personnel.

There was no agreement or requirement between petitioner and the Iranian Government or between petitioner and the Bureau that payment of petitioner's salary while assigned to the Bureau's Iran Division was dependent upon deposits of funds having first been made by the Iranian Government to the Dollar Working Fund or that payment of his salary while assigned to the Bureau's Iran Division was to be made out of Iranian funds. However, the Bureau's providing of the services of its Iran Division employees, including petitioner, under the letter agreement was contingent upon the deposit of such funds by the Iranian Government pursuant to the terms of the letter agreement.

All wages paid to petitioner while he was employed by the Iran Division of the Bureau were paid by United States Treasury Department checks issued to him every two weeks by the Bureau.

While assigned by the Bureau to its Iran Division, petitioner was under the direct supervision and control of a Division Engineer who was an employee of the Bureau and was in charge of all Bureau employees who were assigned to the Iran Division. Among other things, the Division Engineer assigned all the duties to personnel under him; wrote internal travel orders within the jurisdictional geographical area encompassed by the Iran Division; determined the post of assignment of each employee under his control; prepared standard efficiency reports for each employee under his control, which reports are required annually with respect to United States Gov-

ernment employees; approved leave requests; and recommended employees for promotion or other personnel action.

Neither the Iranian Government, nor any of its employees, was empowered to, or did, supervise or control the work of any of the employees of the Iran Division of the Bureau. The Iranian Government could not hire or fire any of the employees of the Iran Division or in any manner control the salary paid or promotions given to any of the Bureau's employees assigned to the Iran Division.

Petitioner's tours of duty with the Bureau's Iran Division were all 2-year agreements but petitioner could have extended his tours beyond their 2 year duration if he had desired to do so.

During the year 1959 while he was in Iran, petitioner maintained a home in Nashville, Tennessee where his wife resided.

While in Iran in 1959, petitioner incurred and paid costs of approximately $3 a day for meals and paid a cook $40 a month to prepare his meals.

During the calendar years 1959, 1960, 1961, and 1962, petitioner received wages under his employment agreements with the Bureau for work performed in Iran in the amount of $9,673.86, $5,210.52, $11,583.00, and $9,043.17, respectively. These wages included base salary plus foreign differentials in the amounts of $1,555.88, $592.92, $2,055.00, and $1,355.50 for the calendar years 1959, 1960, 1961, and 1962, respectively. Withholding taxes were deducted from petitioner's wages for the taxable years 1959, 1960, 1961, and 1962, in the amounts of $1,516.80, $877.05, $1,963.23, and $1,534.54, respectively.

Petitioner on his Federal income tax return for each of the years 1959, 1960, 1961, and 1962 reported and claimed the entire amount of wages received by him from

the Bureau for work performed while he was in Iran as being excludable from gross income under section 911 (a) (2) and claimed a refund for the entire amount of income taxes which had been withheld. No refund was made of any amount of taxes withheld pursuant to these claims except for the year 1960. On June 19, 1961, petitioner received a refund of the $877.05 which had been withheld from his 1960 wages. No suit has been brought by the United States or respondent for recovery of the refund made to petitioner, or any action taken thereon except the issuance of the notice of deficiency on March 27, 1964, from which the petition in this case for the year 1960 was filed.

Respondent in his notices of deficiency for the years involved increased petitioner's reported income by the wages he received from the Bureau for work performed in Iran with the explanation as to each year that it was determined that the wages paid to him by the Bureau constituted taxable income and in the notice of deficiency for the year 1960, the further explanation, "Since you were an employee of the United States government, the amount is not exempt from taxation under section 911 of the Internal Revenue Code."

OPINION.

Under section 911 (a) (2),[2] an individual citizen of the United States, who during any period of 18 consecutive months is present in a foreign country during at least 510

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[2] SEC. 911. EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.

(a) General Rule.—The following items shall not be included in gross income and shall be exempt from taxation under this subtitle:

* * * * * * * * *

(2) Presence in foreign country for 17 months.—In the case of an individual citizen of the United States, who during

full days in such period is not required to include in his gross income earned income received from sources without the United States (except amounts paid by the United States or an agency thereof).

Petitioner is a United States citizen and was present in Iran during the requisite period for each of the years here in issue. The income which he seeks to exclude from his gross income in each such year is income earned by him from services rendered in Iran. Because of these facts respondent recognizes that petitioner is entitled to the exclusion he claims unless his salary during his employment in Iran was paid by the United States or any agency thereof.

It is respondent's position that petitioner was paid by the United States or an agency thereof because he was an employee of the United States, he was supervised by an employee of the United States, and his salary was paid to him by United States Treasury checks issued every two weeks by an agency of the United States. Respondent relies on the employer-employee relationship

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any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United States (except amounts paid by the United States or an agency thereof) if such amounts constitute earned income (as defined in subsection (b)) attributable to such period; but such individual shall not be allowed as a deduction from his gross income any deductions (other than those allowed by section 151, relating to personal exemptions) properly allocable to or chargeable against amounts excluded from gross income under this paragraph. If the 18-month period includes the entire taxable year, the amount excluded under this paragraph for such taxable year shall not exceed $20,000. If the 18-month period does not include the entire taxable year, the amount excluded under this paragraph for such taxable year shall not exceed an amount which bears the same ratio to $20,000 as the number of days in the part of the taxable year within the 18-month period bears to the total number of days in such year.

existing between an agency of the United States and petitioner as placing the legal obligation to pay petitioner's salary only upon that agency and contends that since this legal obligation was discharged by that agency by issuance of United States Treasury checks, the source of the funds to provide for the payment is immaterial.

Petitioner contends that since he was assigned by the Bureau to Iran under the letter agreement between Iran and the Bureau which specifically provided for such assignment, the nature of his employment and by which government his salary was paid should be determined from the terms of the letter agreement. Petitioner contends that the substance of the letter agreement was that employees assignd thereunder were on loan from the Bureau to Iran and were paid by United States Treasury checks issued by the Bureau only because under the letter agreement, the Bureau was acting as the agent of Iran in making the payments. Petitioner points specifically to the provision of the letter agreement that "the compensation of all personnel of the Bureau assigned to Iran * * * will be paid or reimbursed out of * * *" funds deposited by Iran with the United States Treasury Department and credited to a Trust Fund account, as supporting his position that his salary was "paid" by Iran by the check of its agent, the United States Treasury acting through the Bureau.

The position taken by respondent is in substance a summary of the reasoning of the United States Court of Appeals for the District of Columbia in its opinion in *Commissioner v. Wolfe,* 361 F. 2d 62 (C. A. D. C., 1966), reversing 43 T. C. 572. Petitioner's primary position is that our opinion in *Eldon E. Wolfe,* 43 T. C. 572 (1965), reversed by *Commissioner v. Wolfe, supra,* and the dissenting opinion of Judge Fahy in *Commissioner v. Wolfe, supra,* stressing the importance of the source of the funds

from which payment is made are a proper interpretation of the statute.

Petitioner also attempts to distinguish the facts involved in *Eldon E. Wolfe, supra,* from those in this case by pointing out that he, unlike Wolfe, was not a regular Civil Service employee prior to accepting a position in Iran in an "excepted" position and that he did not have the Civil Service retirement rights and Government health benefits that Wolfe had. In our view the factual distinctions are not controlling. Petitioner had the same type of employment as did the taxpayer in the *Wolfe* case except for certain rights Wolfe had acquired because of being in the classified Civil Service prior to being appointed to an "excepted" position.

As we pointed out in *Laurence P. Dowd,* 37 T. C. 399, 408 (1961), the exclusion of the statute is inapplicable to amounts "paid by the United States or an agency thereof" and this inapplicability is not dependent on an employer-employee relationship. The existence of such a relationship and the nature of this relationship are important only to the extent that these facts tend to establish by whom the taxpayer was paid. The nature of the retirement and health benefits to which a taxpayer is entitled are relatively unimportant aspects of such taxpayer's employment in determining by whom such taxpayer was paid although it might be that an employee who had such benefits would receive the government portion of the payments as amounts paid by the United States even though his salary were not otherwise paid by the United States. Petitioner did not have these benefits but did have government insurance benefits. However, only direct salary payments are here in issue. Therefore, the basic question here is whether Iran or the United States, through the Bureau, paid petitioner's salary. In *Johnson v. United States,* an unreported case (M. D. Ala.

Mar. 3, 1966, 17 A. F. T. R. 2d 656, 66-2 U. S. T. C. par. 9575), now on appeal (C. A. 5, 1966), the facts were identical to those in *Eldon E. Wolfe, supra,* and the District Court, based to a large extent on our opinion in *Eldon E. Wolfe, supra,* and the opinion in *Krichbaum v. United States,* 138 F. Supp. 515 (E. D. Tenn., 1956), reached the conclusion that the taxpayer's salary had not been paid by the United States or an agency thereof.

Respondent in the instant case attempts to distinguish *Kirchbaum v. United States, supra,* on the ground that the provisions of the agreement between Ethiopia and the Bureau under which the taxpayer in *Kirchbaum v. United States, supra,* worked in Ethiopia differed from the provisions of the agreement between Iran and the Bureau under which petitioner and the taxpayers in *Eldon E. Wolfe, supra,* and *Johnson v. United States, supra,* were assigned to work in Iran. Respondent states that the obligation to pay the salaries of personnel assigned to Ethiopia by the Bureau in accordance with the agreement between the Bureau and Ethiopia was assumed by the Ethiopian Government whereas under the letter agreement between Iran and the Bureau, Iran did not assume this obligation. While the language of the agreement between Ethiopia and the Bureau differs in certain respects from that of the letter agreement between Iran and the Bureau, the substance of the provisions contained in the two agreements providing for compensation of Bureau personnel to be paid from funds supplied by the foreign government is the same. The Court of Appeals in *Commissioner v. Wolfe, supra,* did not consider *Krichbaum v. United States, supra,* to be distinguishable but stated in its opinion that the case was incorrectly decided. The Court of Appeals in *Commissioner v. Wolfe, supra,* stressed the employer-employee relationship between the taxpayer and the United States as supporting the conclusion that the taxpayer was "paid" by the United States. In reaching this conclusion the Court

pointed to the legislative history of the addition to the section dealing with the exclusion of the words, "except amounts paid by the United States or an agency thereof."[3] The Court of Appeals stated (361 F. 2d at 66):

> On the floor, Senator Reed disagreed with the Committee on abolishing the exemption entirely, and proposed the exception for United States employees. His views ultimately won out. Senator Reed stated that the purpose of the exemption generally was to avoid double taxation of Americans working abroad, and to put them "in a position of equality with their competitors," but that this was wholly inapplicable to Government employees (See 75 Cong. Rec. 10410):
>
> We discovered that the provision had been stretched to the point of exempting an American

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[3] S. Rept. No. 665, 72nd Cong., 1st Sess. (1932), 1939-1 C. B. (Part 2), 496, 518:

Section 116. Exemption of Earned Income From Sources Without the United States.

This section has been amended by the elimination of the subsection excluding from gross income amounts received by bona fide nonresidents of the United States from sources without the United States. Your committee believes there is no reason for the continuance of this exemption in the case of citizens of the United States residing abroad for the reason that under other sections of the Act such citizens are granted a credit for income taxes paid foreign countries and should not be further relieved from Federal income taxes. Furthermore, a considerable proportion of the individuals previously benefited by this subsection have been employees of the United States who, because of their status as such, were usually exempt from any foreign tax upon their compensation received from the United States; these citizens are not believed by your committee to be entitled to a complete exemption from the Federal income tax upon such compensation.

H. Rept. No. 1492, 72nd Cong., 1st Sess. (1932), 1939-1 C. B. (Part 2), 539-543:

Amendment No. 59: This amendment eliminates the exclusion from gross income, in the case of a nonresident individual citizen, of earned income from sources without the United States; and the House recedes with an amendment which restores the exclusion except as to amounts paid by the United States or any agency thereof, and makes clerical changes.

> naval officer or army officer who was stationed, let us say, in the embassy in London or in some foreign country, like our troops in China. Those people were getting complete exemption from the American income tax. We discovered further, to our surprise, that it had been held that American ambassadors and ministers and officers of the Foreign Service were getting clear out of payment of any income tax by virtue of the same provision, which nobody in the world ever intended when the provision was first adopted. These people do not deserve the exemption, because they are not subject to the income taxation of the foreign countries in which they are stationed, any more than we would tax the British ambassador here in Washington on his income.

Taxpayer Wolfe's position clearly falls within the scope of the legislative purpose of the exception. He was a Government employee, and he was not subject to income tax by Iran. The agreement by Iran not to subject him to income tax confirms what would be the normal practice with respect to an employee of a foreign government.

In our decision in *Eldon E. Wolfe, supra,* we concluded, as did the courts in *Krichbaum v. United States, supra,* and *Johnson v. United States, supra,* that the important fact was by whom the taxpayer was "paid" as distinguished from by whom he was employed. In our opinion in *Eldon E. Wolfe, supra,* we relied on *Leif J. Sverdrup,* 14 T. C. 859 (1950); *Robert W. Teskey,* 30 T. C. 456 (1958); *Laurence P. Dowd, supra;* and *Erlandson v. Commissioner,* 277 F. 2d 70 (C. A. 9, 1960), affirming a Memorandum Opinion of this Court, in each of which the taxpayer was considered to have been "paid" by the United States to a large extent because the funds with which his

salary was paid were furnished by the United States. The taxpayers in *Robert W. Teskey, supra,* and *Erlandson v. Commissioner, supra,* were each employed on ships owned by the United States but operated by private corporations hiring personnel and paying them with checks drawn on bank accounts in the name of such private corporation from funds received from the United States Government for the purpose of paying such salaries. In those cases we and the Court of Appeals held that the private corporation was operating the ship merely as an agent of the United States and that the payment to the taxpayer by the agent of the United States was a payment by the United States or an agency thereof. In *Erlandson v. Commissioner, supra,* the Court noted with respect to the funds from which the taxpayer was paid (277 F. 2d at 72):

> The company deposited the funds as received in a bank account under its own name. No provision was made for a trust account, but it is not contended that these monies were commingled with the other funds of the company. The checks given to Erlandson for his services were drawn upon this bank account and were signed by the company as drawer.

Upon a consideration of all the aspects of the agreement between the Bureau and Iran and with due consideration to the legislative history underlying the various amendments to the section providing for the exclusion from gross income of income earned by United States citizens abroad,[4] we adhere to our opinion in *Eldon E. Wolfe,*

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[4] In addition to the Committee reports from which we quoted in footnote 3, see S. Rept. No. 1631, 77th Cong., 2d Sess. (1942), 1942-2 C. B. 504, 548:

> Income From Sources Without the United States in Certain Cases
>
> Under section 116 (a) of the Internal Revenue Code a citizen of the United States residing outside the United States more than six months during the taxable year is exempt from tax on his

supra, and respectfully decline to follow the opinion of the majority of the Court of Appeals in *Commissioner v. Wolfe, supra.*

Our conclusion that petitioner was paid by Iran with the Bureau acting on behalf of Iran in making these payments is based upon the overall agreement between Iran

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earned income from sources outside of the United States, except in the case of income paid by the United States or any of its agencies. This provision of the present law has suffered considerable abuse in the case of persons absenting themselves from the United States for more than six months simply for tax-evasion purposes. To stop this abuse, the House bill repealed section 116 (a).

From cases brought to your committee's attention, the complete elimination of this section would work a hardship in the case of citizens of the United States who are bona fide residents of foreign countries. For example, many employees of American business in South America do not return to the United States for periods of years. Such persons are fully subject to the income tax of the foreign country of their residence. Your committee has adopted a provision which it is believed will effectively terminate the abuse of this section but at the same time will not unduly penalize our citizens who are bona fide residents of foreign countries. It provides that if such citizens establish that they are bona fide residents of a foreign country during the entire taxable year their earned income from sources without the United States will be exempt. If they have been residents of a foreign country for two years or more, this same treatment will be accorded them for the year in which they return to the United States.

See also S. Rept. No. 781, 82d Cong., 1st Sess. (1951), 1951-2 C. B. 458, 495, which states:

Section 116 (a) of the Code exempts from income tax citizens of the United States who are bona fide residents of a foreign country with respect to income earned outside the United States, and disallows deductions chargeable against this income. This provision is intended both to encourage citizens to go abroad and to place them in an equal position with citizens of other countries going abroad who are not taxed by their own countries.

However, the present law has two defects which section 321 of your committee's bill corrects. First, the exclusion is allowed only with respect to an "entire taxable year" with respect to which the individual is a bona fide resident of the foreign country. Thus, exemption is denied an individual in his first year abroad unless he becomes a bona fide resident of the foreign country as of January 1. Section 321 of your committee's bill

and the Bureau as contained in the letter agreement of December 18, 1956, as amended by the letter of August 2, 1960. As we have set forth in our findings, this agreement provided for the assignment of specified personnel by the Bureau to perform services as set forth in the agreement, which services were services within the limits of authority granted by the Iranian Government. Certain local expenditures such as per diem for local travel of employees and the furnishing of transportation were to be paid directly by Iran or under the agreement as amended to the Division Engineer in Iran and by the Division Engineer to such employees as might be entitled to the payment. These provisions indicate that in effect the Bureau employees were on loan to Iran even though not supervised directly by officials of Iran. The agreement specifically provided that the compensation of all person-

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corrects this defect of present law by granting the exclusion with respect to "an uninterrupted period which includes an entire taxable year" with respect to which an individual was a bona fide resident of a foreign country.

In addition, the term "bona fide" residence abroad has been construed quite strictly with the result that many persons who have gone abroad to work even for a relatively long period of time have been unable to meet the test of a "bona fide resident" of a foreign country. Sometimes this has occurred because the nature of the individual's work is such as to make it difficult to establish a "residence" in the more widely accepted use of the term. On other occasions it has resulted from the fact that individuals have gone abroad only for a stated period of time. Examples of this are managers, technicians, and skilled workmen who are induced to go abroad for periods of 18 to 36 months to complete specific projects. Your committee believes, in accord with the point 4 program, that it is particularly desirable to encourage men with technical knowledge to go abroad. As a result your committee has added a paragraph to section 116 (a) of the Code providing that income earned abroad by a citizen of the United States who is present in a foreign country or countries for 17 out of 18 consecutive months is to be excluded from income, and that deductions chargeable to such income will be disallowed in computing his Federal income tax.

These two changes made by your committee's bill are effective with respect to taxable years beginning after December 31, 1950.

nel of the Bureau assigned to Iran would be paid or reimbursed out of the Dollar Working Fund, which Dollar Working Fund was a fund supplied by Iran from loans it secured from the Export-Import Bank or from the International Bank for Reconstruction and Development. The position of the Bureau under its agreement with Iran was substantially the same as the position of the United States Education Commission in Japan involved in *Laurence P. Dowd, supra,* and of the private corporations operating the ships under their agreements with the United States Government in the cases of *Robert W. Teskey, supra,* and *Erlandson v. Commissioner, supra.* Applying the same reasoning as we applied to conclude that the taxpayers in those cases were paid by the United States or an agency thereof, we conclude that petitioner in the instant case was paid by Iran and not by the United States or an agency thereof.

In view of our decision of the primary issue in this case, we do not reach petitioner's alternative contention.

Reviewed by the Court.

Decisions will be entered for petitioner.

Tannenwald, *J.*, dissenting: I believe that in determining whether to follow the decision of the Court of Appeals in *Commissioner v. Wolfe,* 361 F. 2d 62 (C. A. D. C. 1966), the majority has been unnecessarily inhibited by prior decisions construing the language "except amounts paid by the United States or an agency thereof" contained in section 911 (a) (2). Granted that there may be uncertainties in the applicability of the statutory exception in other situations, the legislative history reveals that Congress intended that employees of the United States Government who were bona fide residents of a foreign country should continue to be subject to United States

income tax. See S. Rept., No. 665, 72nd Cong., 1st Sess. (1932), p. 31, 1939-1 C. B. (Part 2) 496, 518; 75 Cong. Rec. 10410. And, at the time the 18-month presence-in-a-foreign-country rule was engrafted on the statute in 1951, Congress included the same language of exception and specifically indicated that it realized that it was doing so. H. Rept. No. 1213, 82nd Cong., 1st Sess. (1951), p. 77, 1951-2 C. B. 622, 630.

I have no quarrel with the majority conclusion that the United States was a paymaster of the funds. My difficulty stems from the fact that the majority test stops there and makes taxability depend upon whether or not there is a trust fund or whether the reimbursement is pursuant to an anterior obligation or comes after the fact. To me, the test of taxability should not turn solely upon such fine points. To the extent that our earlier decision in *Eldon E. Wolfe,* 43 T. C. 572 (1965), reversed by *Commissioner v. Wolfe, supra,* holds otherwise, I would not follow it and would adopt the reasoning of the Court of Appeals. Cf. Rev. Rul. 54-483, 1954-2 C. B. 168, where respondent ruled that employees of contractors with the United States residing abroad were not covered by the exception and were entitled to the benefit of the exclusion, even though their compensation was paid directly by the United States Government. Cf. also Rev. Rul. 67-85, I. R. B. 1967-12, p. 5.

Clearly, in this case the United States was much more than a paymaster of the funds. Moreover, the Bureau of Public Roads was not a mere recruiter of personnel for the Government of Iran. There can be no serious argument that petitioner herein lacked the status of an employee of the Bureau. He worked on a project for which the Bureau had contracted its services and he was under the direct supervision of the Division Engineer, who, as an employee of and on behalf of the Bureau, was the

primary instrument for seeing that the Bureau's responsibilities were properly discharged.

To be sure, he was not a regular Civil Service employee, but he was entitled to the benefit of several laws applicable to employees of the Federal Government—albeit not including those providing health insurance or retirement benefits. Beyond this, petitioner obtained the distinct advantage that the United States Government was responsible for the payment of his salary in dollars.[1] By means of an Excepted Appointment, petitioner avoided all the risks of change of government, convertibility, and devaluation which would have existed if he had accepted employment directly by the Government of Iran. Having chosen to obtain these benefits (as well as the benefit of being relieved of taxation by Iran), petitioner should not be heard to complain.

In 1932, when the exception first entered the law, Congress concededly was thinking only of full-time, regular employees of the United States. The unquestioned need for incentives to enable the Federal Government to recruit personnel to help implement our foreign economic policy came at least fifteen years later. It may well be that these incentives should include the tax benefit which petitioner herein claims. But the applicable statute does not differentiate between types of Federal employees and I do not think that we should draw distinctions based upon a legislative history which fails to take into account a then nonexistent problem. Nor do I think that Congressional silence over the years should be turned into an affirmative blessing of the majority result, a suggestion advanced by Judge

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[1] I doubt that, if the Government of Iran had failed to honor its obligations to the Dollar Working Fund, petitioner could have been denied the right to be paid his salary between the time of such default and the actual termination of petitioner's services by the Federal Government.

Fahy in his dissenting opinion in *Commissioner v. Wolfe, supra.* See 361 F. 2d at p. 69. This is particularly true where every decision on the point prior to 1964 (when Congress last dealt with section 911), with the single exception of a District Court decision (*Krichbaum v. United States,* 138 F. Supp. 515 (E. D. Tenn. 1956)), imposed taxability.[2] Nor do I think it without significance that the legislative trend since 1951 has been steadily to narrow the exclusion for earned income from sources without the United States. Technical Changes Act, 67 Stat. 615 (1953), Sec. 204 (a); Revenue Act of 1962, Pub. L. 87-834, 76 Stat. 960, Sec. 11; Revenue Act of 1964, Pub. L. 88-272, 78 Stat. 19, Sec. 237 (a).

In all the decided cases, except the most recent, there was a coalescence (either directly or in the capacity of a principal of a disclosed agent) of the appointing authority, the obligor of payment, and the ultimate provider of the funds. Perhaps where the status of the taxpayer as an employee of the United States does not exist or is in doubt, additional elements of the situation should be examined. But this is not our case. Where the taxpayer is clearly such an employee and receives his paycheck from the United States, I think we should look no further.

Pierce and Drennan, *JJ.*, agree with this dissent.

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[2] *Erlandson v. Commissioner,* 277 F. 2d 70 (C. A. 9, 1960); *Laurence P. Dowd,* 37 T. C. 399 (1961); *Robert W. Teskey,* 30 T. C. 456 (1958); *Leif J. Sverdrup,* 14 T. C. 859 (1950).

No. 18,192.

United States Court of Appeals
For the Sixth Circuit.

Commissioner of Internal Revenue,
Petitioner,

v.

Louis H. Mooneyhan,
Respondent.

On Petition for Review of the Decision of the Tax Court of the United States.

Decided December 5, 1968.

Before: Weick, Chief Judge, Celebrezze and Peck, Circuit Judges.

Celebrezze, Circuit Judge. This is a petition for review of a Tax Court judgment rendered in favor of Respondent Mooneyhan, hereinafter Respondent. The main question concerns Section 911 (a) (2) of the 1954 Internal Revenue Code as it applies to payments Respondent received while working overseas.

In 1956, Iran borrowed funds to begin a comprehensive program of highway maintenance and construction. Lacking the pertinent resources, men, machines, and expertise in particular, Iran entered into a letter agreement on December 18, 1956, with the United States which provided generally that in return for money furnished by Iran, the United States would put its experience and personnel at that Country's disposal to help carry out the program's objectives.

In September of 1959, Respondent, a United States citizen living in Nashville, Tennessee, accepted an "indefinite

appointment'' as an equipment specialist in the Iran division of the Bureau of Public Roads, Department of Commerce, hereinafter Bureau, the United States agency charged with the administration of the Iran program. Respondent had performed similar work in Ethiopia for the Bureau for several years prior to this appointment. Although he agreed to stay in Iran for at least two years, Respondent could have chosen to remain longer. As it was, he remained for successive two-year periods, interrupted by a nine-month period in the United States.

To obtain the necessary funds for its program, Iran entered into credit agreements with the Export-Import Bank and the International Bank for Reconstruction and Development, located in Washington, D. C. Article XVII of the credit agreement between the Export-Import Bank (Eximbank) and Iran provided:

> ''Prior to and as a condition of the first advance under the credit, Iran shall make arrangements satisfactory to Eximbank under which the Bureau of Public Roads will provide the services of United States Engineers and technicians to assist in developing and carrying out the program of highway maintenance and training referred to herein and, at the request and with the approval of Iran, will select and purchase highway maintenance equipment, spare parts, and laboratory and shop equipment appropriate thereto and cause the same to be transported and insured to Iran.''

Iran issued checks on drawing accounts established with the bank credits, which were deposited as a trust fund account in the United States Treasury under the designation, ''Technical Assistance U. S. Dollars Advanced From Foreign Governments, Bureau of Public Roads.'' This ''Working Fund'' was established for the following purposes: to pay or reimburse to the United States, either

by direct charges against the Fund or through reimbursements therefrom (1) the compensation of all Bureau personnel assigned to Iran and (2) the cost of transporting them, their dependents and household goods both to and from Iran. Iran paid a fee to the Bureau to cover its cost of administering the Fund which was recovered by the Bureau through a one percent charge against the total amount paid out of the Fund. Certain local expenses, such as those for office rental, personnel and transportation, were to be paid directly by Iran.

The letter agreement further provided that Bureau personnel assigned to Iran were to be under the exclusive supervision of a Bureau employee, a Division Engineer, who would write efficiency reports required by Civil Service regulations that apply to United States employees. Such reports are used to determine whether an employee should be promoted. The decision whether to hire an employee for the Iran program or retain him in it also rested with the Bureau.[1]

Respondent's activities when in Iran were to be controlled by his immediate employer, the Bureau, however his and the Bureau's presence were contingent upon Iran meeting its obligation to supply dollars for the Working Fund.

Section 911 (a) (2) of the Code allows a United States citizen to exclude from gross income "amounts received from sources without the United States." This language is followed by the parenthetical clause, "except amounts paid by the United States or any agency thereof." The

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[1] Respondent was entitled to certain benefits provided by statute to United States employees, including group life insurance, pay increases, annual and sick leave, and unemployment compensation. He did not, however, participate in the United States employees' retirement program or the Federal Employees' Health Insurance program.

exclusion is available when the individual has met certain residence requirements, which Respondent did.[2]

Respondent contends that he was paid by Iran, a source admittedly outside the United States, because, when viewed functionally the arrangement delegated to the United States the role of a mere paymaster on behalf of Iran. Petitioner, on the other hand, urges that we ignore the arrangement made by the parties for disbursing the funds and look to the legislative history of Section 911 (a) (2) which shows a clear congressional intent to deny the exclusion to virtually all United States employees, including Respondent, because they are such.

The issue presented here is not new, having been passed on by the Courts of Appeals for the Fifth and District of Columbia Circuits, and the Court of Claims. These Courts held that the exclusion was never meant to reach the payments in question.[3] But the United States District Court for the Eastern District of Tennessee and the Tax Court have held to the contrary.[4]

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[2] "Section 911. EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES. (a) General Rule.—The following items shall not be included in gross income and shall be exempt from taxation under this subtitle: * * * (2) Presence in foreign country for 17 months.—In the case of an individual citizen of the United States, who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United States (except amounts paid by the United States or an agency thereof) if such amounts constitute earned income attributable to such period."

[3] *United States v. Johnson,* 386 F. 2d 824 (5th Cir. 1967); *Commissioner v. Wolfe,* 361 F. 2d 62 (D. C. Cir. 1966) (Judge Fahy, dissenting), cert. denied, 385 U. S. 838; *Johnson v. United States,* 390 F. 2d 775 (Ct. Cl. 1968).

[4] *Krichbaum v. United States,* 138 F. Supp. 515 (E. D. Tenn. 1956) (opinion of Judge Taylor). In the instant case, the Tax Court, three judges dissenting, adhered to its decision in *Wolfe v. Commissioner,* 43 T. C. 572 (1965), which had been reversed by the District of Columbia Circuit in *Commissioner v. Wolfe,* supra.

The legislative history of Section 911 demonstrates that the exclusion was intended to spur Americans to work abroad by placing them on an equal footing with their foreign competitiors by leaving them subject only to the income taxes levied in the country where they are employed. See *Krichbaum v. United States,* 138 F. Supp. 515 (E. D. Tenn. 1956), where Judge Taylor details the history of this Section.

Attempts were then made in Congress to eliminate the exclusion. Certain Americans, specifically United States employees stationed abroad and paid by the United States Government were receiving a double tax benefit, namely, exemption for all income tax. The exclusion from United States taxes permitted them to escape some of their burden while the traditional reluctance of one sovereign to tax another freed these employees from the rest.[5]

The exclusion was not eliminated; but Congress did add the parenthetical phrase "except amounts paid by the United States or any agency thereof" found in the present Section 911 (a) (2) to put an end to the double benefit received by individuals who were paid by the United States or its agency while working abroad.

We now focus on the language of the statute to determine whether, given the congressional purpose behind the exclusion and its exception, Iran or the United States or its agency, the Bureau of Public Roads, paid Respondent's salary.

The Tax Court, relying principally on the reasoning of the Ninth Circuit in *Erlandson v. Commissioner,* 277 F. 2d 70 (1960), held that Iran paid Respondent's salary. 47

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[5] The letter agreement confirmed the usual practice: United States employees assigned to the Iran division were exempted from all Iranian income taxes, duties, fees and customs charges.

T. C. 693. Although we agree with the result in *Erlandson*, we believe that the Tax Court reached the wrong conclusion.

In *Erlandson*, the taxpayer worked abroad a ship owned by the United States and operated by its agent, a private corporation. The United States deposited funds with its agent out of which Erlandson was paid. The source of these funds was the United States and the Ninth Circuit had to decide who paid them within the meaning of Code Section 911 (a) (2). In deciding that Erlandson's salary fell within the exception, the Court used the following yardstick: "If Erlandson was an employee of the United States, the conclusion necessarily follows that he was paid by the United States or an agency thereof." The Court determined that Erlandson was an employee of the United States because he worked for that country through its corporate agent, so that: "[the corporate agent] was but a conduit for the payment of wages by the United States to taxpayer."

We agree with this result since Erlandson was working for the United States and being paid with American money. Under the facts of the *Erlandson* case, the Court properly concluded that when United States employees are paid with United States funds while working abroad, they are not entitled to the Section 911 (a) (2) exclusion. Even though the United States was not the source of the funds in the case before us we believe, nevertheless, that when Congress added the exception it meant to deny the exclusion to all United States employees working overseas no matter who provides the funds for their salaries.

United States employees do not become while working overseas employees of foreign countries competing as such with other employees of those countries for identical wages; nor do they travel abroad with that purpose in mind. To be entitled to the exclusion, there must be a

direct relationship between the individual claiming it and his foreign employer; the absence of such a relationship defeats the claim. As we read its legislative history, the exception to the exclusion logically denies to employees of the United States a tax benefit that was enacted by Congress to help American citizens become foreign employees.

This leads to what we believe to be the proper construction of the Section 911 (a) (2) exclusion, giving full effect to the congressional purpose behind it; whenever an employee of the United States receives his wages from his employer—whether this be "the United States [itself] or an agency thereof"—the exclusion and the exception to it are to be read together so that the source of the funds becomes immaterial to the question of who paid them.

In the matter before us, Respondent's employment contract was entered into with an agency of the United States Government, the Bureau of Public Roads of the Department of Commerce, which had exclusive control over how his work was to be done, rate of compensation, tenure of employment, and promotions. The Bureau paid his salary biweekly with United States Treasury checks drawn on the dollars in the Working Fund and if it had defaulted in paying his salary, Respondent would have been compelled to face the Bureau, not Iran, to recover it. To Iran, the Bureau was no less than an independent contractor which agreed on behalf of the United States to put American personnel and experience at that Country's disposal in exchange for the dollars in the Working Fund.

> "We think the wording of the statute, the ordinary meaning of the words used, and the legislative history, all support the view that basically salaries of U. S. Government employees paid by the U. S. Government are not within the exemption. We see no

basis for inserting a gloss that would make the tax exemption applicable where the Government receives reimbursement (here, not complete reimbursement) from another source having no direct relationship to employee-taxpayer. No difference in legislative intent should be ascribed to the fact that the reimbursement is secured by an advance deposit (here made with funds in turn advanced by the U. S. Government)." *Commissioner of Internal Revenue v. Wolfe,* 361 F. 2d 62, 67 (D. C. Cir. 1966).

We hold that although Iran was the source of the funds, as an employee of the United States, Respondent was "paid by . . . an agency thereof," the Bureau of Public Roads, and cannot avail himself of the exclusion provided by Section 911 (a) (2) of the Code.

We now consider additional arguments Respondent raised which were not reached by the Tax Court.

He contends that Section 162 (a) (2)[6] of the Code allows him to deduct amounts he spent for meals while working in Iran. Under this Section, Respondent must show that the cost of his meals was a traveling expense incurred "while away from home in the pursuit of [his] trade or business."

By providing this deduction, Congress intended to help the taxpayer whose employment demands that he travel. *Harvey v. Commissioner,* 283 F. 2d 491 (9th Cir. 1960). This taxpayer normally maintains two homes—his business residence and his usual place of abode. If he travels

[6] Section 162. Trade or Business Expense. (a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including— * * *

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; . . ."

away for short periods of time, Congress recognized that it is not reasonable to expect him to carry his home with him; as a result, he may deduct his traveling expenses, including those incurred for meals and lodging. On the other hand, if his or his employer's business requires that he remain at another location for longer periods of time he will, under the scheme of our tax law, be expected to take his home with him. Expenses for meals and lodging here are not deductible since they are not incurred "while away from home." See *Harvey v. Commissioner,* 283 F. 2d 491 (9th Cir. 1960), *Wright v. Hartsell,* 305 F. 2d 221 (9th Cir. 1962).

The Courts, however, have had some difficulty with the phrase "while away from home" since Congress never defined it. The Commissioner and the Courts generally agree that if a taxpayer is away only "temporarily" on business he is considered to be "away from home" within the meaning of the statute and may deduct his expenses. See *e. g., Burns v. Gray,* 287 F. 2d 698 (6th Cir. 1961). But if the taxpayer is away "permanently", a term that presents no real problem, or "indefinitely", a term that does since it begs definition, his tax home shifts to his principal place of employment and he may not deduct his expenses. *England v. United States,* 345 F. 2d 414 (7th Cir. 1965); *Cockrell v. Commissioner,* 321 F. 2d 504 (8th Cir. 1963). This concept of tax home has received the tacit approval of the Supreme Court. *Commissioner v. Stidger,* 386 U. S. 287, 87 S. Ct. 1065, 18 L. Ed. 2d 53 (1967); *United States v. Correll,* 389 U. S. 299, 88 S. Ct. 445, 19 L. Ed. 2d 537 (1967).

Respondent accepted his appointment with the Bureau knowing that he would immediately go to Iran and remain there for a minimum of two years or longer, if he desired. His principal post of duty was not Nashville, Tennessee, but Iran. The demands of his employment did not force

him to travel from place to place to earn a living; his employer simply asked that he go to Iran and remain there for as long as he liked.[7] Respondent did not travel away from home within the meaning of Code Section 162 (a) (2) and he cannot deduct the cost of his meals.

Finally, Respondent asserts that the Commissioner should be estopped from taxing the income he received while employed in Iran because Respondent received tax refunds on wages earned during the years he worked in Ethiopia. This he contends gave him reason to expect the same treatment in later years. The fact that he could save money was, according to Respondent, one of the inducements that led him all the way to Iran.

Respondent's argument is, as we understand it, that the Commissioner should be estopped from collecting taxes not barred by the statute of limitations if he revises his opinion about what the law is. The doctrine of equitable estoppel, however, cannot prevent the Commissioner from correcting a mistake of law no matter where Respondent was led. *Automobile Club v. Commissioner,* 353 U. S. 180 (1957); *cf. Schuster v. Commissioner,* 312 F. 2d 311 (9th Cir. 1962).

We find no merit in Respondent's inchoate assertions that the Commissioner could not assess a deficiency for the year 1960 because he had previously refunded to Respondent all taxes withheld for that year, and that Respondent is entitled to a partial exclusion under Code Section 912 (1).

Reversed.

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[7] Respondent could have taken his wife with him at Iran's expense.

No. 18,192.

United States Court of Appeals
for the Sixth Circuit.

Commissioner of Internal Revenue,
Petitioner,

vs.

Louis H. Mooneyhan,
Respondent.

} Order.

Before: Weick, Chief Judge, Celebrezze and Pack, Circuit Judges.

Upon consideration, Respondent's petition for rehearing is hereby denied.

Entered by Order of the Court,

Carl W. Reuss,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1149

LOUIS H. MOONEYHAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (Pet. A–1) is reported at 47 T.C. 693. The opinion of the court of appeals (Pet. A–25) is reported at 404 F. 2d 522.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1968. The order of the court of appeals denying rehearing was entered on January 8, 1969 (Pet. A–35). The petition for a writ of certiorari was filed on March 12, 1969. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

388-832—69

QUESTION PRESENTED

Whether salary petitioner received while he was employed in Iran was "paid by the United States" within the meaning of Section 911(a)(2) of the Internal Revenue Code of 1954 and, accordingly, subject to federal income tax?

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 911. EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES
>
> (a) *General Rule.*—The following items shall not be included in gross income and shall be exempt from taxation under this subtitle:
>
> * * * * *
>
> (2)[1] *Presence in foreign country for 17 months.*—In the case of an individual citizen of the United States, who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income (as defined in subsection (b)) attributable to such period; * * *
>
> * * * * *

(26 U.S.C. (1958 ed.) 911.)

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[1] Section 911(a)(2) was amended by Section 11(a) of the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960, 1003-1004, but the amendment is not relevant to the issue involved herein.

STATEMENT

Iran borrowed funds from the United States in 1956 to begin a comprehensive program of highway maintenance and construction. (Pet. A–25.) The United States agreed to furnish men, machines and know-how to help Iran carry out its objectives. Iran also borrowed funds from the Export-Import Bank and from the International Bank for Reconstruction and Development which it deposited in a trust fund account in the United States Treasury to reimburse the United States for expenditures incurred in compensating the employees sent to Iran. (Pet. A–26.)

Petitioner, in September 1959, accepted an "indefinite appointment" with the Bureau of Public Roads of the Department of Commerce to work as an equipment specialist in Iran. (Pet. A–25—A–26.) Petitioner was paid by the Bureau of Public Roads of the Department of Commerce with United States Treasury checks. (Pet. A–9.) Petitioner's employment contract was entered into with the Bureau of Public Roads, which had exclusive control over how his work was to be done, his rate of compensation, his tenure of employment, and his promotions. (Pet. A–31.)

In his tax returns for the four years 1959 through 1962 petitioner claimed that the amounts paid for his work in Iran were excludable from gross income under Section 911(a)(2) of the Internal Revenue Code of 1954. The Commissioner of Internal Revenue determined that petitioner was not entitled to the exclusion on the grounds that the amounts were "paid by the United States" within the meaning of the

statutory exception to the Section 911(a)(2) exclusion. The Tax Court ruled for petitioner. The court of appeals reversed.

ARGUMENT

1. The decision of the court of appeals is correct. In general, the Internal Revenue Code exempts from taxation income earned by an American citizen who has worked outside the United States for at least 17 out of 18 consecutive months. Section 911(a)(2), *supra,* p. 2. Excepted from the scope of this exemption are "amounts paid by the United States or any agency thereof." *Ibid.* It is undisputed that petitioner was literally paid by the United States — bi-weekly by Treasury checks sent from the United States. (Pet. 5; A–9.) In addition, petitioner's employment contract was entered into with an agency of the United States Government. If petitioner for any reason was not paid, he would look to the United States Bureau of Public Roads, and not to Iran, for payment. The Bureau had exclusive control over how he worked, how much he was paid, and whether and when he was promoted or dismissed. Plainly he was an employee of and was paid by the United States.

When Congress added the exception to the exclusion, it meant to deny the exclusion to all United States employees working overseas, essentially because they do not compete with other persons in those countries for identical wages and generally are—as was petitioner (Pet. A–7)—exempt from foreign income taxes. It is indeed the double exemption from income taxes which petitioner seeks here that the ex-

ception to Section 911(a)(2) was intended to withdraw.[2] As the court of appeals stated (Pet. A–30—A–31):

> To be entitled to the exclusion, there must be a direct relationship between the individual claiming it and his foreign employer; the absence of such a relationship defeats the claim. As we read its legislative history, the exception to the exclusion logically denies to employees of the United States a tax benefit that was enacted by Congress to help American citizens become foreign employees.

The precise issue before this Court has been passed upon by the Courts of Appeals for the Fifth and District of Columbia Circuits and the Court of Claims.[3] These courts, in accord with the court below, held that the exclusion did not reach the payments in question.[4]

2. There is no conflict between the decision below

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[2] The legislative history of the other sections of the code petitioner relies upon (Pet. 6) shows that Congress simply intended to place all United States employees (as opposed to United States citizens who are foreign employees) on equal ground. See H. Rep. No. 2319, 81st Cong., 2d Sess. 58; S. Rep. No. 2375, 81st Cong., 2d Sess. 48; and see Reply Brief for the Petitioner in the instant case in the court of appeals, at p. 3.

[3] *United States* v. *Johnson*, 386 F. 2d 824 (C.A. 5); *Commissioner* v. *Wolfe*, 361 F. 2d 62 (C.A.D.C.), certiorari denied, 385 U.S. 838; *Johnson* v. *United States*, 390 F. 2d 715 (Ct. Cl.).

[4] The United States District Court for the Eastern District of Tennessee has held to the contrary. See *Krichbaum* v. *United States*, 138 F. Supp. 515. Contrary to petitioner's contention (Pet. 7) that the Commissioner should be estopped because *Krichbaum* was not appealed, the Commissioner cannot be prevented from correcting a mistake of law. See *Automobile Club* v. *Commissioner*, 353 U.S. 180; cf. *Schuster* v. *Commissioner*, 312 F. 2d 311 (C.A. 9).

and *Erlandson* v. *Commissioner,* 277 F. 2d 70 (C.A. 9) (see Pet. 8). In *Erlandson,* the United States had engaged a company which (*id.* at 71), "as the government's agent 'and not as an independent contractor,' " managed a vessel owned by the United States. The court concluded that when the agent received money from the United States and used it to pay the crew's wages, the United States had actually made the payment through its agent. In the present case there is no principal-agent relationship between the Governments of Iran and the United States. The mere fact that Iran reimbursed the United States for the expenditures in connection with the assistance program did not render the United States the agent of Iran with respect to the original expenditures, and did not make Iran the payor of petitioner's salary, and in no way changed the essential employer-employee relationship between petitioner and the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
LOUIS M. KAUDER,
JOHN S. STEPHAN,
Attorneys.

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